2012 IL App. (1st) 102790

FIRST DIVISION
March 30, 2012

No. 1-10-2790

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

DONVEN HOMES, INC.,	)	
	)	Appeal from the
Plaintiff and	)	Circuit Court of
Counterdefendant-Appellant,	)	Cook County.
	)	
v.	)	
	)	
AMERISURE INSURANCE COMPANY,	)	No. 09 CH 27021
	)	
Defendant and	)	
Counterplaintiff-Appellee,	)	
	)	
	)	Honorable Martin S. Agran,
(Craig Behrendt, Andra R. Behrendt, Daniel J. McCarthy,	)	Judge Presiding.
Jutta Windeck McCarthy, Lawrence E. Malysa, Irmgard C.	)	
Malysa, Duane Grist and Pamela Grist,	)	
	)	
Counterdefendants).	)	

JUSTICE HALL delivered the judgment of the court.

Justices Karnezis and Rochford concurred in the judgment.

O R D E R

¶ 1 ***Held*** **:** Summary judgment for insurer proper where the additional insured failed to establish as a matter of law that the underlying complaints alleged property damage caused by an occurrence as required for coverage under the insurance policy.

¶ 2 Plaintiff, Donven Homes, Inc. (Donven), appeals from an order of the Circuit Court of Cook County granting summary judgment to defendant Amerisure Insurance Company (Amerisure), and denying summary judgment to Donven. The sole issue on appeal is whether the grant of summary judgment to Amerisure and the denial of summary judgment to Donven was error. We affirm the order of the circuit court. The pertinent facts are set forth below.

¶ 3 I. BACKGROUND

¶ 4 Donven constructed the houses in the Ashbrook Subdivision, located in Indian Head Park, Illinois. Donven subcontracted with Ashback and Vanselow, Inc. (AVI) to perform carpentry work. The subcontract provided that AVI carry commercial general liability insurance and name Donven as an additional insured "with respect to general liability coverage."

¶ 5 A. The Insurance Policy

¶ 6 Amerisure issued a commercial general liability policy of (CGL) (the policy) to AVI. The pertinent policy provisions are set forth below.

"1. Insuring Agreement.

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those

damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. ***.

b. This insurance applies to 'bodily injury' and 'property damage' only if:

(1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'; and

(2) The 'bodily injury' or 'property damage' occurs during the policy period."

The policy defined "occurrence " as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions. "Property damage" was defined as:

"a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it."

¶ 7 The CGL policy also included a "Blanket Additional Insured Endorsement." The endorsement provided in pertinent part as follows:

"Section II - WHO IS AN INSURED is amended to include as an insured any person or organization, called an additional insured in this endorsement:

1. Whom you are required to add as an additional insured on this policy under a written contract or agreement; or

2. Who is named as an additional insured under this policy on a certificate of

insurance;

* * *

The insurance provided to the additional insured is limited as follows:

1. That person or organization is only an additional insured with respect to liability arising out of:

(a) Premises you own, rent, lease, or occupy, or

(b) 'Your Work' for that additional insured."

B. The Underlying Complaints

¶ 8 In 1998, Craig and Andra Behrendt, Daniel and Jutta McCarthy, Lawrence and Imgard Malysa, and Duane and Pamela Grist (collectively the plaintiffs) contracted with Donven to purchase houses built by Donven in the Ashbrook subdivision. Subsequently, the plaintiffs experienced problems with the houses, relating to the installation of the windows and roofs, the foundations, and the decks.

¶ 9 In 2008, the plaintiffs filed four separate complaints against Donven and AVI. The original and amended complaints alleged the following causes of action against Donven: (1) breach of implied warranty of good workmanship and materials; (2) breach of implied warranty of habitability; (3) breach of express warranty; (4) consumer fraud; and (5) common law fraud. The plaintiffs alleged that the construction defects were caused by improper installation and the use of defective materials, and required them to repair and replace damaged portions of their houses. The plaintiffs sought damages for present and future costs of repairs, inspections and replacement of the damaged portions of their houses.

¶ 10 Donven tendered the defense of each of the underlying complaints to Amerisure. Amerisure declined the tenders asserting that it did not have a duty to defend Donven since the underlying complaints did not allege property damage caused by an occurrence required for coverage under the policy.

¶ 11 C. Circuit Court Proceedings

¶ 12 Donven filed a declaratory judgment complaint against Amerisure seeking a declaration that Amerisure owed a duty to defend and indemnify it in relation to the underlying complaints and to bar it from raising policy defenses. Donven also sought attorney fees and costs from Amerisure pursuant to section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2008)). Amerisure filed an answer, affirmative defenses and a counterclaim for declaratory judgment. Amerisure sought a declaration that it had no duty to defend and indemnify Donven with respect to the underlying complaints.

¶ 13 Donven and Amerisure filed cross-motions for summary judgment. The circuit court granted Amerisure's motion for summary judgment and denied Donven's motion for summary judgment. The court determined that the underlying complaints alleged damage to the houses themselves from defective construction by Donven and its subcontractors, which required repair and replacement of the damaged portions of the houses. Since the underlying complaints sought only the cost of repairing and replacing the faulty workmanship, the court found as follows:

> "This does not constitute property damage caused by an occurrence as those terms are defined in the policy and applied by Illinois courts. As the underlying complaints do not allege facts that bring the cases within or potentially within coverage, there can be no

duty to defend. As there is no duty to defend, there is no duty to indemnify and there is no violation of 215 ILCS 5/155."

Donven filed a timely notice of appeal.

¶ 14 II. ANALYSIS

¶ 15 A. Standard of Review

¶ 16 The *de novo* standard of review applies to our review of a circuit court's grant of summary judgment. *Luise, Inc. v. Village of Skokie*, 335 Ill. App. 3d 672, 678 (2002). The construction of the provisions of an insurance policy presents a question of law to which the *de novo* standard of review is also applicable. See *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005).

¶ 17 The principles guiding our review of the grant of summary judgment are well settled. "Summary judgment is proper if, and only if, the pleadings, depositions, admissions, affidavits and other relevant matters on file show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Illinois Farmers Insurance Co. v. Hall*, 363 Ill. App. 3d 989, 993 (2006). The court should uphold the grant of summary judgment only when the right of the moving party is free from doubt. *Hall*, 363 Ill. App. 3d at 993.

¶ 18 Where the parties have filed cross-motions for summary judgment, they invite the court to determine the issues as a matter of law and enter judgment in favor of one of the parties. *Hall*, 363 Ill. App. 3d at 993. We consider the entire record in determining whether summary judgment was properly granted. Any doubt as to the duty to defend must be resolved in favor of the insured. *Pekin Insurance Co. v. Pulte Home Corp.* 404 Ill. App. 3d 336 340 (2010).

¶ 19 B. Discussion

¶ 20 Two requirements must be satisfied before the duty to defend arises: (1) the action must be brought against an insured, and (2) the allegations of the complaint must disclose the potential for policy coverage. *Federal Insurance Co. v. Economy Fire & Casualty Co.*, 189 Ill. App. 3d 732, 735 (1989). In this case, there is no dispute that Donven is an insured under the policy.

¶ 21 To determine whether an insurer has a duty to defend its insured from a lawsuit, a court compares the facts alleged in the underlying complaint to the relevant portions of the insurance policy. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 363 (2006). The insurer is obligated to defend the insured if the complaint alleges facts within or potentially within the policy's coverage. *Valley Forge Insurance Co.*, 223 Ill. 2d at 363. The insurer must defend the insured even if the allegations are false, fraudulent or groundless, and even if only one theory of recovery alleged in the underlying complaint is potentially covered under the policy. *Valley Forge Insurance Co.*, 223 Ill. 2d at 363. In this case, in order for there to be coverage, the complaint must allege property damage resulting from an occurrence and arising out of the work AVI performed for Donven.

¶ 22 The policy defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." While not defined in the policy, "accident" has been defined as " 'an unforeseen occurrence, usually of an untoward or disastrous character or an undesigned sudden or unexpected event of an inflictive or unfortunate character. [Citation.]' " (Internal quotation marks omitted.) *Viking Construction Management, Inc. v. Liberty Mutual Insurance Co.*, 358 Ill. App. 3d 34, 42 (2005) (quoting *State Farm Fire &*

Casualty Co. v. Tillerson, 334 Ill. App. 3d 404, 409 (2002)).

¶ 23 An accident does not include the " 'natural and ordinary consequences of an act.' " *Viking Construction Management, Inc*., 358 Ill. App. 3d at 47 (quoting *Monticello Insurance Co. v. Wil-Freds Construction, Inc.*, 277 Ill. App. 3d 697, 703 (1996)). A defect that is no more than the natural and ordinary consequence of faulty workmanship is not caused by an accident. *Tillerson*, 334 Ill. App. 3d at 409. Where the damages are the natural and ordinary consequence of improper construction methods, defective construction claims do not fall within the coverage of CGL policies. *Stoneridge Development Co. v. Essex Insurance Co.*, 382 Ill. App. 3d 731, 751-52 (2008).

¶ 24 Donven maintains that the analysis of what constitutes an occurrence in cases such as *Viking Construction Management, Inc*. and *Wil-Freds Construction, Inc.* applies where a general contractor is sued for defects pertaining to the structure he himself is building. Donven asserts that the instant case presents a different situation in that Donven, the general contractor, is being sued for damages caused by its subcontractor's work. It maintains that where the subcontractor has performed the faulty work and there is no allegation of intentional conduct by the general contractor, the property damage is "accidental" and constitutes an occurrence. In support of its argument, Donven relies on *U.S. Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64 (1991), *Prisco Serena Strum Architects, Ltd. v. Liberty Mutual Insurance Co.*, 126 F.3d 886 (7th Cir. 1997), and *Sheehan Construction Co. v. Continental Casualty Co.*, 935 N.E.2d 160 (Ind. 2010), *opinion adhered to as modified on reh'g on other grounds*, 938 N.E.2d 685 (Ind. 2012).

¶ 25 In *Wilkin Insulation Co.*, Wilkin was sued for the costs of removing asbestos from buildings in which it had installed insulation. Wilkin's insurers refused to defend it, *inter alia*, on the ground that the contamination of the buildings did not constitute an occurrence. The insurance policies defined "occurrence" as " 'an accident, including continuous or repeated exposure to conditions which result in property damage *** neither expected or intended from the standpoint of the insured.' " *Wilkin Insulation Co.*, 144 Ill. 2d at 76. The supreme court rejected the insurers' argument that since the installation of the asbestos insulation was intentional, the installation did not constitute an occurrence. Having determined that the contamination of the buildings and the contents by the asbestos fibers constituted property damage, the court pointed out that under the policy's definition of occurrence, it was the property damage that must have been expected or intended. As there were no allegations in the complaints that Wilkin expected or intended to contaminate the buildings, there was potential coverage under the policies. *Wilkin Insulation Co.*, 144 Ill. 2d at 77-78.

¶ 26 Donven's reliance on *Wilkins Insulation Co.* is misplaced. The definition of "occurrence" in *Wilkins Insulation Co.* differs from the policy definition in the present case. The policy in *Wilkins Insulation Co.* required that the property damage be "neither expected or intended from the standpoint of the insured." That language is not contained in the definition of occurrence in the policy in this case. Further, in *Viking Construction Management, Inc.*, this court noted that "the holding and rationale of *Wilkin Insulation Co.* has been limited to the unique situation of incorporating asbestos into a larger structure, *i.e.*, a building." *Viking Construction Management, Inc.*, 358 Ill. App. 3d at 53 (citing *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill.

2d 278, 306 (2001)).

¶ 27 In *Prisco*, the underlying complaint alleged that Prisco had been hired to design and supervise the construction of a school building. The school sued the general contractor, Axelrod, and Prisco alleging that Axelrod's performance had damaged the building and that Prisco was responsible for the damage because it had failed to discover that Axelrod's performance was not in compliance with the contract, failed to guard against the deficiencies in Axelrod's work and failed to keep the school informed. The court of appeals reversed the summary judgment for Prisco, finding no coverage under a policy exclusion.

¶ 28 Donven relies on that portion of the court of appeals' analysis dealing with whether the school's complaint alleged property damage resulting from an occurrence. In its analysis, the court distinguished cases such as *Wil-Freds Construction, Inc*. on the ground that such cases involved claims against the contractor who actually did the work, whereas the allegations against Prisco were in connection with its duties of inspection and certification. Relying on *Wilkin Installation Co.,* since the school did not allege that Prisco intentionally overlooked Axelrod's faulty work or expected that it would not discover the defects in Axelrod's work, or that it intentionally certified work that was not performed, the school's complaint alleged an "occurrence" within the meaning of the policy. *Prisco*, 126 F.3d at 891.

¶ 29 Relying on *Prisco*, Donven points out that in the consumer fraud counts, the underlying complaints alleged that Donven hired an incompetent subcontractor, AVI, and then failed to supervise AVI's work. Since the complaints did not allege that the damages resulting from hiring AVI or failing to supervise its work were intended or expected, Donven argues that the

underlying complaints alleged property damage resulting from an occurrence.

¶ 30 In *Viking Construction Management, Inc*. this court found that *Prisco*'s analysis of "occurrence" was neither persuasive nor controlling. This court pointed out that the court in *Prisco* relied on the definition of "occurrence" in *Wilkin Insulation Co.*, which differed from the definition in the policy before it. Similar to the policy in the present case, in *Prisco*, the policy defined "occurrence" as " 'an accident, including continuous or repeated exposure to substantially the same general harmful conditions.' " *Prisco*, 124 F.3d at 890. The court pointed out that the analysis in *Prisco* ignored the limitation on the holding in *Wilkin Insulation Co.* and "instead expands it to include incorporation of other things, particularly construction services. There is simply no basis or rationale for doing so and thus, we do not follow *Prisco*'s holding regarding 'occurrence.' " *Viking Construction Management, Inc*., 358 Ill. App. 3d at 53.

¶ 31 In *Sheehan Construction Co.,* the CGL policy defined "occurrence" as " ' an accident, including continuous or repeated exposure to substantially the same general harmful conditions.' " The Indiana supreme court held that if the faulty workmanship was unexpected and without intention and design, it was not foreseeable and therefore constituted an accident within the meaning of a CGL policy. *Sheehan Construction Co.*, 935 N.E.2d at 170. The court explained that where it is assumed work would be done negligently, it is foreseeable that damages will result. However, where the assumption is that the work will be completed properly, then the damage is not foreseeable and constitutes an "accident." *Sheehan Construction Co.*, 935 N.E.2d at 170. However, the court's analysis ignores the holdings in Illinois cases that an accident does not include the natural and ordinary consequences of an act and that a defect

that is no more than the natural and ordinary consequence of faulty workmanship is not caused by an accident. See *Viking Construction Management, Inc*., 358 Ill. App. 3d at 47; *Tillerson*, 334 Ill. App. 3d at 409.

¶ 32 Donven then contends the damages alleged in the underlying complaints were the result of the incorporation of AVI's work into the plaintiffs' houses and therefore, constitutes property damage caused by an occurrence. While defective construction claims do not fall within the coverage of CGL policies, Illinois courts have held that " 'construction defects that damage something other than the project itself will constitute an " occurrence" ' under a CGL policy." *CMK Development Corp. v. West Bend Mutual Insurance Co.*, 395 Ill. App. 3d 830, 840 (2009) (quoting *Stoneridge Development Co. v. Essex Insurance Co.*, 382 Ill. App. 3d 731, 752 (2008). For example, defective workmanship that caused water damage to the homeowners' furniture, clothing and antiques constituted an occurrence. *CMK Development Corp.*, 395 Ill. App. 3d at 840 (citing *Pekin Insurance Co. v. Richard Marker Associates, Inc.,* 289 Ill. App. 3d 819, 823 (1997)).

¶ 33 " '[T]here must be damage to something other than the structure, *i.e.*, the building, in order for coverage to exist.' " *CMK Development Corp*., 395 Ill. App. 3d at 842 (quoting *Viking Management Co.*, 358 Ill. App. 3d at 54; see *Richard Marker Associates, Inc.,* 289 Ill. App. 3d at 822 (coverage requires damage to other materials not furnished by the insured). The underlying complaint must allege " 'negligent workmanship that resulted in damage to something other than the structure worked upon.' " *CMK Development Corp*., 395 Ill. App. 3d at 842 (quoting *Viking Management Co.*, 358 Ill. App. 3d at 54. Since the underlying complaints in this case did not

allege damage to or loss of use of any property other than the houses themselves, the underlying complaints did not allege property damage caused by an occurrence.

¶ 34 Finally, with regard to the other federal and out-of-state cases relied on by Donven, we found it unnecessary to discuss them as there was ample Illinois authority to resolve the issues in this case. *Allstate Insurance Co. v. Lane*, 345 Ill. App. 3d 547, 552 (2003) ("Only in the absence of Illinois authority on the point of law in question are we to look to other jurisdictions for persuasive authority").

¶ 35 III. CONCLUSION

¶ 36 We conclude that Donven had failed to establish that the underlying complaints alleged property damage caused by an occurrence. Since there was no potential coverage for Donven under the policy, Amerisure had no duty to defend or indemnify Donven in the underlying suits. Therefore, the award of summary judgment to Amerisure and denial of summary judgment to Donven was proper.

¶ 37 The judgment of the circuit court is affirmed.

¶ 38 Affirmed.